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ABSTRACT

The paper examines the continuing overrepresentation of minorities in special education programs for the mildly handicapped and their underrepresentation in programs for the gifted and talented. Alternative policy strategies are presented for advocates and decision makers concerned with reducing the increasing racial and ethnic disparities in special education. The legal, judicial, and educational history challenging the inequalities of tracking and special education classes for the mildly handicapped are reviewed. Among court decisions specifically addressed are the following: Larry P. v. Riles; Hobson v. Hanson; Mills v. Board of Education; and Lau v. Nichols. In addition, a list of cases addressing tracking after Brown v. Board of Education (1954) and after the 1975 enactment of the Education for All Handicapped Children Act is provided. The "myth" of the beneficial effects of special education is attacked on the basis of high dropout and unemployment rates for the disabled. The Larry P. and Lau cases are recommended as the bases for further challenges. (DB)

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SPECIAL EDUCATION TRACKS OF INEQUALITY

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Thirty-six years after Brown v. Board of Education, has failed to eradicate the historical tracking, segregation, and exclusion of poor, minority, and handicapped children and youth in Special Education. Five recent federal court cases in Florida, New York, Mississippi, Maryland, and Georgia, are again challenging Special Education's disproportionate overrepresentation of minorities as "mildly handicapped" and their underrepresentation in programs for the gifted and talented. Alternative policy strategies are presented for advocates and decision-makers concerned with reducing the increasing racial and ethnic disparities in Special Education as well as avoiding the growing budget busting costs of litigation.

Presentation:

Part 1 - Recent federal court decisions are once again challenging traditional educational practices of "achievement" and "ability grouping" of minorities in Special Education. Judicial interventions and ambivalence over "tracking" minorities in Special Education has marked these renewed cases and

controversies in three southern (Florida, Mississippi, and Georgia) and two northern states (New York and Maryland) (Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd., 1989; U.S. v. Yonkers Bd. of Educ., 1987; Montgomery v. Starkville Mun. Separate School Dist., 1987; Vaughns v. Board of Educ. of Prince George's County, 1985; and Ga. State Conf. of Br. of NAACP v. State of Georgia, 1985).

The disproportionate overrepresentation of minorities misclassified as "educable retarded," "learning disabled," and "speech and language impaired" has been paralleled by their underrepresentation in programs for the gifted and talented. The disturbing reports of higher dropout rates among Blacks, Hispanics, American Indians, and Alaskan natives from Special Education provides compelling reasons for a review of existing policies and practices and search for alternatives (Ysseldyke, J.E. and Algozzine, B., 1990, pp. 433-439; U.S. Office of Special Education Programs, 1989; National Council on Disability, 1989; Wagner, M., 1989; Wyche, L.G., 1989; and U.S. Office for Civil Rights, 1987).

Thirty-five years of an enlightened post Brown v. Board of Education era has failed to eradicate Special Education's historical tracking, segregation, and exclusion of poor, minority, and handicapped children and youth in our nation's schools. Yesterday's promise of equality of educational opportunity is being reversed by

today's teaching of inequality by the effects of tracking upon a growing multiminority in Special Education (Harvard Law Review, 1989; Warren, W.J., 1988; Fredman, F., 1986; and Oaks, J., 1985).

Dunn's (1968) earlier characterization of Special Education for the mildly handicapped as "obsolete and unjustifiable" is today's ethical imperative. Judicial and legislative interventions during the past twenty years have dramatically improved public policies and practices prohibiting the segregation of minorities in our nation's schools. Today, concern is beginning to shift towards risk research and prevention (National Research Council, 1989 and Pianta, R.C., 1990). In addition to the continuing "Minority Mild Mental Retardation Overrepresentation (Reschly, D.J., 1988)," attention is focusing on increases in "The minority dropout rate" among "Black students in learning disability classes (Wyche, L.M. Op. Cit.)" and "Hispanic Students at Risk (Rueda, R., 1989; Fradd, S.H. and Correa, V.I., 1989)."

Paralleling these developments are the human tragedies and costly legal consequences of the growing number of cases and controversies of discrimination against minorities and handicapped in Special Education (Schwartz, L., 1987a; Pullin, D., 1987; and Reschly, D.J., Op. Cit.).

Part 2 - There is an urgent need for improving our

risk communication about the effects of tracking students in Special Education who are in great jeopardy of dropping out and unemployment. Recommendations are presented for targeting disability policy studies, using available telecommunication "Information Age" technology, for an interdisciplinary approach to prevention and reform.

Advocates for the handicapped now have additional civil rights and remedies available to prevailing students and their parents pursuant to the Handicapped Children's Protection Act of 1986. Local and state administrators and school board members also face new challenges and opportunities for early settlement of disputes and avoiding often unnecessary, protracted, and costly litigation. Teacher educators in our colleges and universities have a signal responsibility for improving risk communication about the iatrogenic effects of Special Education and avoiding misclassification, misplacement, and other legal misfortunes (Schwartz, L. 1987b; Sido, K.R. and King, P.R., 1989; and Florian, L.D. and West, J., 1989).

Part 2 - Cases and Controversies: The Best Evidence

The legal challenges to tracking minorities in education is is presented in two periods; the early judicial interventions during the post-Brown desegregation years 1969-1975 to the 1976-1990 years following the Education of All the Handicapped Act of 1975 (EHA). The post-desegregation cases were numerous and essentially expressed the consensus of the nation's courts in carrying out the mandates of Brown in dismantling a dual school system necessary for attaining the equality of opportuntity assured by the 14th Amendment to the Constitution and Title VI of the Civil Rights Act of 1964. However, the recent opinions reported in federal court decisions in three southern and two northern states reflect an ambivalent interpretation towards the effects of prior segregated school systems on increasing racial disparities. Although the Larry P. v. Riles decisions (1972, 1974, 1979, and 1984) appeared to establish a post Brown standard in discriminatory tracking of minority handicapped students, the judicial rationale affirming this landmark case has illuded recent litigants in the segregation cases discussed herein.

In retrospect, Larry P. was Brown 25 years later.

School practices following Brown in 1954 frequently was designed to forestall desegregation. In Hobson v. Hansen (269 F.Supp. 401 (1967), the District of Columbia tracking system was struck down as having a disproportionate impact on minorities which violated the equal protection clause of the

Constitution. The tests used in the D.C. schools was the primary determinant in placing children into tracks which resulted in a disproportionate percentage of minority children being placed in the track that disadvantaged them in school and subsequent employment. Judge J. Peckham, in writing the 1972 decision in Larry P. (343 F.Supp. 1306), cited Judge J. Skelly Wright's justification in Hobson:

> The law has a special concern for minority groups for whom the judicial branch of government is often the only hope for redressing their legitimate grievances; and a court will not treat lightly a showing that educational opportunities are being allocated according to a pattern that has unmistakable sighs of invidious discrimination. Defendants, therefore, have a weighty burden of explaining why the poor and the Negro should be those who populate the lower ranks of the track system (at 1310).

It should be noted that Hobson was the beginning of the landmark Mills v. Bd. of Education, one of only two cases cited in the legislative history of P.L. 94-142. Mills served as the basis for the non-discriminatory testing provisions in the statute and regulatory provisions protecting the rights of minorities from the abuses of tracking and segregating handicapped minorities in special education.

Applying "a discriminatory effect analysis," the district court in Larry P. (at 564) relied on "The Supreme Court's signal Title VI case (in) Lau v. Nichols 414 U.S. 563 (1974), holding specifically that 'discrimination is barred which has that effect even though no purposeful design is present.

> Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority

> group children must be designed to meet such language skiil needs as soon as possible and must not operate as an educational deadend or permanent track (Lau v. Nichols, at 568).

The Lau decision, using the "effect" test based upon H.E.W. regulations (45 CFR pt 80) issued pursuant to Title VI of the Civil Rights Act of 1964, was then used by the Plaintiff's in the Larry P. case, affirmed and restated by the 9th Circuit Court of Appeals in 1984 (793 F.2d 969, at 982).

The significance of the Larry P. decision can also be seen in the court's reliance upon the additional civil rights provisions and remedies of the Rehabilitation Act of 1973 and the Education for All the Handicapped Act of 1975.

The controversies today are also weighing the presumed educational benefits of ability grouping versus the legal issues of equal opportunity in segregated and unitary school systems. None of the cases reported todate were filed prior to the applicable time period specified in the Handicapped Children's Protection Act of 1986 (HCPA). The HCPA was enacted to reverse the U.S. Supreme Courts 1984 decisions in Smith and Tatro by amending the EHA to allow the inclusion of other civil rights and remedies as well as attorneys fees to prevailing parents and their advocates. The civil rights and remedies available pursuant to provisions of Section 504 of the Rehabilitation Act of 1973 and Section 1983 of the 1871 Civil Rights Act provide new overlapping legal standards and criteria for determining discrimination against the

handicapped in education (Martinez v. Hillsborough .

The implications of the new applicable legal standards and criteria as it may apply to tracking and ability grouping of the multiminority students will be discussed at the conclusion of this section. In particular, recommendations will be offered on how to avoid the "budget busting" costs already impacting on school districts throughout the nation with almost 100 reported federal court decisions since enactment of the 1986 Handicappped Children's Protection Act (HCPA).

Table 1 presents the reported federal court decisions on tracking minority, mildy handicapped, and gifted students in regular and Special Education. The cases are cited in chronological order and were selected on the basis of the controversies over the use of test scores for grouping minority students into low and high ability and/or achievement groupings. Excluded were the numerous compliance investigated by the U.S. Office of Civil Rights and presented in the Education of the Handicapped Law Review. The list of cases is followed by a brief overview of several comprehensive reviews from the related educational and legal literature during these periods. A critical analysis of the current cases with recommendations for future approaches to the problems concludes this section.

Special Education Tracks of Inequality

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Presented at the CEC Symposium on Culturally Diverse Exceptional Children, Albuquerque, N.M., Oct. 20, 1990

TRACKING CASES REPORTED IN THE FEDERAL COURTS

1. Post 1954 Brown v. Board of Education

Hobson v. Hansen, 269 F.Supp. 401 (D.C. 1967)

Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969)

United States v. Tunica County School District., 421 F.2d 1236 ((5th Cir. 1970)

Diana v. Board of Education, No. C-70-37 RFP (N.D. Calif. Jan. 7, 1970)

Spangler v. Pasadena City Board of Education, 311 F.Supp. 501 (C.D. Calif. 1970)

United States v. Sunflower County School District, 430 F.2d 839 (5th Cir. 1970)

Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971)

Moses v. Washington Parish School Board, 330 F. Supp. 1340 (E.D. La. 1971)

P. v. Riles, 343 F.Supp. 1306 (N.D. Calif. 1972)

Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (D.C. 1972)

Hart v. Community School Bd. of Ed., N.Y. Sch. Dist. #21, 512 F.2d 37 (2nd Cir. 1975)

McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975)

Morales v. Shannon 516 F.2d 411 (5th Cir. 1975)

2. Post/1975 Education for All the Handicapped Act

United States v. Gadsden Cty. Sch. Dist., 572 F.2d 1049 (5th Cir. 1978)

Lora v. Board of Educ. of City of New York, 456 F.Supp. 1211 (E.D.N.Y. 1978)

Matti T. v. Holladay, No. DC-75-31 (N.D. Miss. Jan. 26, 1979)

Anderson v. Banks, 520 F.Supp. 472 (S.D.Ga. 1981)

Vaughns v. Board of Educ. of Prince George's County, 574 F.Supp. 1280 (D.Md. 1983)

Larry P. By Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984; affirming 495 F.Supp. 926 (N.D.Cal.1979)

United States v. Yonkers Bd. of Educ., 624 F.Supp. 1276 (S.D.N.Y. 1985)

Ga. State Conf. of Br. of NAACP v. State of Ga., 775 F.2d 1403 (1985)

Montgomery v. Starkville Mun. Separate School Dist., 665 F.Supp. 487 (N.D.Miss. 1987)

Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd., 883 F.2d 945 (11th Cir. 1989)

Arvizu v. Waco Independent School Dist., 732 F.Supp. 721 (W.D.Tex. 1989)

In the Matter of Dekalb County School District and Georgia Department of Education, No. 86-504-2, Civil Rights Reviewing Authority, April 26, 1990 (Reported in 16 EHLR 724, Supp. 267, 6/15/90; Also, see Freeman v. Pitts, No. 89-1290, Petition for Certiorari Filed 2/12/90 U.S.Sup.Ct., Appealing 887 F.2d 1438 (11th Cir. 1989).

Notes: The Waco Independent School District in Arvizu had achieved a "unitary system" despite the disparity of few minorities in "ability grouping" or "tracking" within the district's program for the gifted and talented...achievement gap between "Anglos and minorities and the drop-out rates..." The U.S. Supreme Court has agreed to review Oklahoma City Public Schools appeal of decision on desegregation case; also, school districts in Denver, Colorado, Topeka, Kansas, have also filed with the Supreme Court their appeals.

Post Brown v. Board of Education Desegregation Area

The profound influences of judicial decisions on Special Education have been discussed in comprehensive reviews by Turnbull, H. (1978), Bersoff, D.N. (1982), and Reschly, D.J. (1988). The well known classic "right to education" cases (Mills and PARC) and controversial "placement test bias" decisions (Larry P. and PASE) have clearly influenced legislative inititives and professional practices in improving educational opportunities for minorities and handicapped. These earlier racially disparative provions were attributed to "allegations of unethical practices...suggestions of incompetence among personnel involved with the classification/placement decisions...and the fairness of IQ tests to black students (Reschly, D.J., Op. Cit., p. 25)."

The resultant marked decline in the numbers and percentages of the mildly mentally retarded is creating new dilemmas and contradictions by the astounding increase in learning disabilities. The traditional self-serving professional assumption that special education for the mildly handicapped is beneficial and especially helpful for underachieving minorities is once again under attack. These is certainly, nothing new about this persistent myth advanced by benevolent benefactors and friends of the mildly handicapped. As in the past, these supporters and providers have in effect, and, no doubt unintended, contributed to a iatrogenic form of de facto segregation and exclusion of minorities.

The best evidence that minority students in Special Education are at high risk in our nation's schools has not as yet been presented to judges and juries. The persistent legal challenges to the statistically racial disparities in tracking students into low and high ability and achievement groups based upon test scores continues. Despite "expert witness" testimony to the contrary, the Courts are ambivalent in their findings of discrimination in student assignments to Special Education programs.

A critical analysis of the exceptional student membership, comparing least restrictive and segregated assignments of whites and blacks in Special Education for the mildly handicapped, reveals the newer form of seqregation. The author presents 24 federal cases dealing with tracking racially and culturally minorities in the education of school children with disabilities. 13 cases followed the 1954 Brown decision and 11 post 1975 EHA. Of the six most recent challenges to the tracking system (between 1983 and 1990), found that only Yonkers, New York, discriminated against minorities in special education.

The Eleventh Circuit Court of Appeals on September 15, 1989, ruled that "there is no evidence to suggest that the racial imbalances in the gifted and EMH programs are vestiges of the prior de jure segregation (Jacksonville Branch, NAACP v. Duval County School Board, 1989, p. 953)." EMH (Educable Mentally Handicapped) is Florida's term for distinguishing

between children categorically classified as either "educable" or "trainable" "mentally retarded." However, the Court did find that the racial composition "in the areas of faculty and staff assignment, have perpetuated the effects of the prior system of segregation" and that the school district had not as yet achieved "unitary status" (Ibid). Even though "72% of the students in the district's EMH program were black," with a 65% white and 35% Black racial composition of 101,000 children attending 140 schools during 1984-85, the District had complied with state rules and procedures. The facts that only "6.5% of the students enrolled in the gifted program were black" and that "forty-two of forty-three teachers in the program were white (Op. Cit., p. 949)," were troublesome to the panel of three appellate judges.

Surprisingly, the Court's judicial notice of the District's more "stringent" criteria and guidelines for determining eligibility than the state's rules and regulations for programs for the gifted did not influence their findings of fact.

> No evidence was presented that would give rise to the inference that the tests and methods used to assess a student's eligibility for the program had a discriminatory effect on black student's other than their statistical underrepresentation in the program (Op. Cit., p. 950).

Clearly, statistical disparaty alone is insufficient evidence with regard to minority student membership to prove intentional discrimination. The additional criteria and

procedures for selection and admission to programs for the gifted apparently did not raise this fact to a higher level of judicial review.

> Despite any resulting numerical racial disproportionality, achievement grouping is permissible in a school district that has not been declared fully unitary 'if the school district can domonstrate that its assignment menthod is not based on the present results of past discrimination...' (citations omitted) We are disturbed, however, by the overwhelming predominance of white teachers in the gifted program and consider this fact to be probative with respect to the district's faculty assignment practices (Op. Cit., p. 953).

This judicial tolerance of statistically significant racial imbalances in special education membership is consistent with several recent challenges of ability grouping of minority and "slower groups" (Georgia State Conference of Branches of NAACP v. Georgia, 1985; Montgomery v. Starkville Municipal Separate School District, 1987, and McNeal v. Tate County School District, 1975, (both in Mississippi); and Morales v. Shannon, 1975 (Texas). In marked contrast to these decisions in these three southern states were the findings in U.S. v. Yonkers Board of Education (1987) holding "the city liable for intentional racial segregation in subsidized housing and public schools."

> The special education classes for emotionally disturbed children were viewed as a dumping ground for minority children; they were three-quarters filled with minorities, a proportion that was unexplainable on a race-neutral basis; these classes were generally staffed with minority teachers assigned because of their race; the classes were bused long distances to pre-

> dominantly white schools where they were carefully separated from the regular school population for all phases of the school day activities. Pointed to by school officials as examples of bad behavior, these special education students were despised by the impressionable young white students and their parents (p. 1229).

The comprehensive review and critique of the District's Special Education program offers a compelling case study of our historical failures in our quest for equal opportunity.

> Although significant and partly successful efforts were made during the mid-1970's to improve several aspects of the district's Special Education program, other stigmatizing practices either resurfaced or were permitted to continue. This factor, together with the spillover effects of the district's previous discriminatory practices and their impact on school desegregation generally, demonstrates that the historically discriminatory operation of the Special Education program continued to have discriminatory effects as of the filing of this action (United States v. Yonkers Bd. of Educ., 1985, pp. 1461-1462).

A Challenge and Opportunity

An alternative policy question confronting Special Education professionals is how to improve risk communication about the effects of tracking minority and poor students. The shocking dropout rates for handicapped students reported by the National Council on Disability (1989) should signal immediate action towards reversing the traditional notion of the beneficial effects of Special Education. The Council found that the 36% dropout rate for students with disabilities compared to 25% for all students and the 66% unemployment rate for Americans with disabilities versus 5% nationwide, was not

acceptable. These disparaties, while not proving discrimination against the handicapped, should dispell the myth of the generalization underlying the beneficial effects of Special Education.

Lau and Larry P. teach us that intent to discriminate is not a necessary finding in tracking cases in education. In fact, the EHA was modeled after Title VI and contains similar statutory and regulatory provisions against discrimination. In addition, the HCPA now offers a wide range of complimentary civil rights remedies for advocates seeking relief from the dead-end tracking in Special Education. The best of conventional wisdom suggests that the course in the future should be based upon tried and proven paths of the past. Lau and Larry P. offer such assurance.

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